

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

_____	)	
CONTENTGUARD HOLDINGS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
AMAZON.COM, INC.; APPLE INC.;	)	
BLACKBERRY LIMITED (FKA RESEARCH	)	
IN MOTION LIMITED) AND BLACKBERRY	)	
CORPORATION (FKA RESEARCH IN	)	
MOTION CORPORATION); HTC	)	
CORPORATION AND HTC AMERICA, INC.;	)	No. 2:13-cv-01112 (JRG)
HUAWEI TECHNOLOGIES CO., LTD. AND	)	
HUAWEI DEVICE USA, INC.; MOTOROLA	)	JURY TRIAL DEMANDED
MOBILITY LLC; SAMSUNG ELECTRONICS	)	
CO., LTD., SAMSUNG ELECTRONICS	)	
AMERICA, INC., and SAMSUNG	)	
TELECOMMUNICATIONS AMERICA, LLC,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
DIRECTV, LLC	)	
	)	
Intervener.	)	
_____	)	

**DEFENDANTS' EMERGENCY MOTION TO PRECLUDE CONTENTGUARD  
FROM PRESENTING LIVE TESTIMONY FROM DR. GOODRICH  
AT THE FEBRUARY 6 CLAIM CONSTRUCTION HEARING**

Just one week before the upcoming February 6 claim construction hearing in this case, Plaintiff ContentGuard Holdings, Inc. notified Defendants for the first time that it planned to call its expert witness, Michael Goodrich, to offer live testimony even though it unequivocally stated in its Patent Rule 4-3 disclosures that it would rely only on Dr. Goodrich's declaration. Allowing ContentGuard to present this live testimony without the advance notice to Defendants required by the Local Patent Rules will result in substantial prejudice to Defendants and should not be allowed.

**I. ContentGuard Did Not Disclose in Its Patent Rule 4-3 Disclosures that It Would Rely on Live Testimony at the Claim Construction Hearing**

Patent Local Rule 4-3(d) requires parties to file a Joint Claim Construction Chart and Prehearing Statement that identifies whether it “proposes to call one or more witnesses, including experts, at the Claim Construction Hearing, the identity of each such witness, and for each expert, a summary of each opinion to be offered in sufficient detail to permit a meaningful deposition of that expert . . . .” Patent Rule 4-3(d). “Both the letter and the spirit of the Patent Rules require early and complete disclosure of extrinsic evidence relevant to claim construction.” *Lodsys, LLC v. Brother Int'l Corp.*, No. 2:11-cv-90, 2013 WL 6442185, at \*1 (E.D. Tex. Mar. 12, 2013).

On November 19, 2014, the parties filed their joint claim construction and prehearing statement, and ContentGuard stated twice that it “may rely upon testimony (*by declaration*) from Dr. Michael Goodrich.” (Dkt. No. 292 at 3 (emphasis added); Dkt. No. 292-3 at 2.) At 7:57 p.m. on January 28, 2015, only eight days before the claim construction hearing, ContentGuard notified the Defendants for the first time that it “plans to rely on Dr. Goodrich's live testimony.” (Ex. 1.)<sup>1</sup>

ContentGuard asserts that it should be allowed to present live testimony despite the lack of proper notice to Defendants because of the Supreme Court's recent decision in *Teva Pharmaceuticals*

---

<sup>1</sup> On January 23, 2015, in response to a request to confirm that ContentGuard would not be offering live testimony, ContentGuard suggested that it was “reconsidering the issue.” (Ex. 2.) Then, ContentGuard waited almost another week before saying anything more. ContentGuard “may not merely drop a *hint* that it *may*” rely on live testimony. *Lodsys*, 2013 WL 6442185, at \*2.

*USA, Inc. v. Sandoz, Inc.*, 574 U.S. \_\_\_, 135 S. Ct. 831 (2015). Not only had the Supreme Court granted certiorari in that case on March 31, 2014, but *Teva* also did not alter the role of expert testimony in claim construction. The decision merely clarified the appellate standard of review for subsidiary factual disputes based on extrinsic evidence bearing on claim construction. 574 U.S. \_\_\_, at \*11–12; *cf. Martinez v. Tex. Dep’t Criminal Justice*, 300 F.3d 567, 573 (5th Cir. 2002) (“Normally, we will entertain legal issues raised for the first time on appeal *only* ‘in extraordinary instances . . . to avoid a miscarriage of justice.’”). Dr. Goodrich’s testimony remains extrinsic evidence whether ContentGuard relies on his declaration or live testimony.

ContentGuard has also represented to Defendants that Dr. Goodrich will not testify outside of the statements made in his declarations. If Dr. Goodrich’s testimony will, in fact, be the same as what he stated in his declaration, then there is no need to present it in a different medium.

## **II. Allowing ContentGuard to Rely on Live Testimony Would Substantially Prejudice Defendants**

If ContentGuard is permitted to call Dr. Goodrich at the claim construction hearing without proper notice, Patent Rule 4-3 is rendered meaningless. In reliance on ContentGuard’s representations in its Patent Rule 4-3 disclosures that it would not be offering live testimony, Defendants elected not to depose Dr. Goodrich. Defendants also agreed to the three-hour duration of the hearing with the understanding that there would not be live testimony. For the same reasons, Defendants have not prepared to cross-examine Dr. Goodrich at the hearing and have not made plans to present live testimony of their own expert.

To try to alleviate this prejudice, Defendants suggested rescheduling the claim construction hearing to give Defendants adequate time to depose Dr. Goodrich and to prepare for his live testimony, but ContentGuard refused. ContentGuard offered a two-hour deposition the day before the claim construction hearing. That would not allow Defendants enough time to meaningfully prepare, take, and review a deposition transcript or to prepare their own expert witness.

## CONCLUSION

For the foregoing reasons, the Court should preclude ContentGuard from calling Dr. Goodrich live at the February 6 claim construction hearing. Because of the urgency of this issue, Defendants respectfully request a telephonic hearing as soon as possible.<sup>2</sup>

---

<sup>2</sup> During the parties' meet and confers on January 29, 2015, counsel for ContentGuard represented that it did not object to the Court holding a telephonic conference on this issue. In addition, counsel for ContentGuard agreed to respond to this motion by noon on January 30, 2015, so that the Court can resolve this issue quickly, if possible.

Respectfully submitted,

/s/ Jennifer H. Doan

Jennifer H. Doan  
Texas Bar No. 08809050  
Joshua R. Thane  
Texas Bar No. 24060713  
HALTOM & DOAN  
6500 Summerhill Road  
Crown Executive Center, Suite 100  
Texarkana, TX 75505  
Telephone: (903) 255-1000  
Facsimile: (903) 255-0800  
Email: jdoan@haltomdoan.com  
Email: jthane@haltomdoan.com

Glen E. Summers (admitted pro hac vice)  
Glen.summers@bartlit-beck.com  
Alison G. Wheeler (admitted pro hac vice)  
Alison.wheeler@bartlit-beck.com  
Katherine Hacker (admitted pro hac vice)  
Kat.hacker@bartlit-beck.com  
BARTLIT BECK HERMAN PALENCHAR &  
SCOTT LLP  
1899 Wynkoop Street, 8th Floor  
Denver, CO 80202  
Telephone: (303) 592-3100  
Facsimile: (303) 592-3140

Michael Valaik (admitted pro hac vice)  
michael.valaik@bartlit-beck.com  
Abby Mollen (admitted pro hac vice)  
Abby.mollen@bartlit-beck.com  
Joshua Ackerman (admitted pro hac vice)  
joshua.ackerman@bartlit-beck.com  
BARTLIT BECK HERMAN PALENCHAR &  
SCOTT LLP  
54 West Hubbard Street, #300  
Chicago, IL 60654  
Telephone: (312) 494-4400  
Facsimile: (312) 494-4440

**COUNSEL FOR DEFENDANT  
AMAZON.COM, INC.**

/s/ Bryan K. Anderson (w/ permission)

Bryan K. Anderson  
Bkanderson@sidley.com  
Nathan Greenblatt  
Ngreenblatt@sidley.com  
SIDLEY AUSTIN LLP  
1001 Page Mill Road, Building 1  
Palo Alto, CA 94304  
Telephone: (650) 565-7007  
Facsimile: (650) 565-7100

David T. Pritikin  
Dpritikin@sidley.com  
Richard A. Cederoth  
Rcederoth@sidley.com  
Nathaniel C. Love  
Nlove@sidley.com  
SIDLEY AUSTIN LLP  
One South Dearborn Street  
Chicago, IL 60603  
Telephone: (312) 853-7000  
Facsimile: (312) 853-7036

Melissa Richards Smith  
Melissa@gillamsmithlaw.com  
GILLAM & SMITH LLP  
303 South Washington Avenue  
Marshall, TX 75670  
Telephone: (903) 934-8450  
Facsimile: (903) 934-9257

**COUNSEL FOR DEFENDANT  
APPLE INC.**

/s/ Charles Everingham, IV (w/ permission)

Charles Everingham, IV  
Ceveringham@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
911 West Loop 281, Suite 412  
Longview, TX 75604  
Telephone: 903-297-7404  
Facsimile: 903-297-7402

Todd Landis  
Tlandis@akingump.com  
Eric Klein  
Eklein@akingump.com  
AKIN GUMP STRAUSS  
HAUER & FELD LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, TX 75201  
Telephone: 214-969-2800  
Facsimile: 214-969-4343

Kevin McBride  
Kmcbride@akingump.com  
AKIN GUMP STRAUSS  
HAUER & FELD LLP  
4 Park Plaza, Suite 1900  
Irvine, CA 92614  
Telephone: 949-885-4200  
Facsimile: 949-885-4101

James Loughlin Duncan III  
Jduncan@akingump.com  
AKIN GUMP STRAUSS  
HAUER & FELD LLP  
1111 Louisiana Street, 44th Floor  
Houston, TX 77002  
Telephone: 713-220-5800  
Facsimile: 713-236-0822

**COUNSEL FOR DEFENDANT  
DIRECTV, LLC**

/s/ Scott Partridge (w/ permission)

Scott Partridge  
Scott.partridge@bakerbotts.com  
Lisa Kelly  
Lisa.kelly@bakerbotts.com  
Bradley Bowling  
Brad.bowling@bakerbotts.com  
BAKER BOTTS LLP  
One Shell Plaza  
901 Louisiana  
Houston, TX 77002  
Telephone: 713-229-1569  
Facsimile: 713-229-7769

**COUNSEL FOR DEFENDANT  
HUAWEI TECHNOLOGIES CO., LTD.  
AND HUAWEI DEVICE USA, INC.**

/s/ Peter Wied (w/ permission)

Eric H. Findlay  
Efindlay@findlaycraft.com  
Brian Craft  
Bcraft@findlaycraft.com  
FINDLAY CRAFT, P.C.  
102 N. College Avenue, Suite 900  
Tyler, TX 75702  
Telephone: 903-534-1100  
Facsimile: 903-534-1137

Peter J. Wied  
Pwied@goodwinprocter.com  
Vincent K. Yip  
Vyip@goodwinprocter.com  
Jay Chiu  
Jchiu@goodwinprocter.com  
GOODWIN PROCTER LLP  
601 S. Figueroa Street, 41st Floor  
Los Angeles, CA 90017  
Telephone: 213-426-2500  
Facsimile: 213-623-1673

**COUNSEL FOR DEFENDANTS  
HTC CORP. AND HTC AMERICA, INC.**

/s/ Robert W. Unikel (w/ permission)

Robert W. Unikel  
Robert.unikel@kayescholar.com  
KAY SCHOLER LLP  
80 W. Madison Street, Suite 4200  
Chicago, IL 60602-4231  
Telephone: 312-583-2300  
Facsimile: 312-583-2360

Michael J. Malacek  
Michael.malacek@kayescholar.com  
Timothy K. Chao  
Timothy.chao@kayescholar.com  
KAY SCHOLER LLP  
3000 El Camino Real  
2 Palo Alto Square, Suite 400  
Palo Alto, CA 94306  
Telephone: 650-319-4500  
Facsimile: 650-319-4700

Gregory Blake Thompson  
Blake@themannfirm.com  
James Mark Mann  
Mark@themannfirm.com  
MANN TINDEL & THOMPSON  
300 W. Main Street  
Henderson, TX 75652  
Telephone: 903-657-8540  
Facsimile: 903-657-6003

**COUNSEL FOR DEFENDANT  
MOTOROLA MOBILITY LLC**

/s/ Neil Phillip Sirota (w/ permission)

Neil Phillip Sirota  
Neil.sirota@bakerbotts.com  
Robert Lawrence Maier  
Robert.maier@bakerbotts.com  
Brian Boerman  
Brian.boerman@bakerbotts.com  
Guy Eddon  
Guy.eddon@bakerbotts.com  
BAKER BOTTS LLP  
30 Rockefeller Plaza, 44th Floor  
New York, NY 10112  
Telephone: (212) 408-2548  
Facsimile: (212) 259-2548

Michael Joseph Barta  
Michael.barta@bakerbotts.com  
BAKER BOTTS LLP  
The Warner  
1299 Pennsylvania Avenue NW

Washington, DC 20004  
Telephone: (202) 639-7703  
Facsimile: (202) 585-1058

Michael E. Jones  
Mikejones@potterminton.com  
Allen F. Gardner  
Allengardner@potterminton.com  
Potter Minton, A Professional Corporation  
110 North College, Suite 500  
Tyler, TX 75702  
Telephone: 903-597-8311  
Facsimile: 903-593-0846

**COUNSEL FOR DEFENDANTS  
SAMSUNG ELECTRONICS CO., LTD.  
SAMSUNG ELECTRONICS AMERICA,  
INC. AND SAMSUNG  
TELECOMMUNICATIONS AMERICA,  
LLC**

**CERTIFICATE OF CONFERENCE**

The undersigned certifies that counsel has complied with the meet and confer requirement in Local Rule CV-7(h). Counsel for ContentGuard opposes this motion. Counsel for Defendants conducted two telephonic meet and confers with counsel for ContentGuard on January 29, 2015, with the following attendees: Glen Summers, Kat Hacker, Josh Ackerman and Josh Thane for Amazon.com, Inc.; Ted Chandler for Apple, Inc.; Eric Findlay for HTC Corp. and HTC America, Inc.; Scott Partridge for Huawei Technologies Co. Ltd. and Huawei Device USA, Inc.; Rob Unikel for Motorola Mobility LLC; Neil Sirota, Brian Boerman, and Allen Gardner for Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC; and Radu Lelutiu, Sam Baxter, and Holly Engelmann for ContentGuard. The parties could not reach an agreement on reasonable limits for the number of asserted claims and prior art references, and, therefore, the parties are at an impasse.

/s/ Jennifer H. Doan  
Jennifer H. Doan

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on January 29, 2015. *See* Local Rule CV-5(a)(3)(A).

/s/ Jennifer H. Doan  
Jennifer H. Doan